IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11/12/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

CRL OP.NO.20586 of 2003 and CRL OP.NO. 20587 OF 2003
AND
CRL.M.P.No.5870 OF 2003

K.V.Ramasamy ... Petitioner

-Vs-

The Superintendent of Customs,
Customs Preventive Unit,
Salem. ... Respondent

Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure for the relief as stated therein.

For petitioner : Mr.A.Thiagarajan

For respondent : Mr.P.N.Prakash,
Spl. Public Prosecutor(Customs)

:O R D E R

Both the above criminal original petitions have been filed under Section 482 of the Code of Criminal Procedure praying to set aside the orders dated 17.6.2003 respectively made in Crl.M.P.Nos.611 and 610 of 2003 by the Court of Special Judge, (Economic Offences), Coimbatore, thereby dismissing the petitions filed by the petitioner herein under Section 311 of Cr.P.C.

2. Tracing the history of the case, it comes to be known that the petitioner herein filed Crl.M.P.No.611 of 2003 on the file of the Court of Special Judge, (Economic Offences), Coimbatore, praying to cut open the bags, which were seized by the respondent, in the open court to verify the contents of the same; that he has also filed Crl.M.P. No.610 of 2003 praying to recall P.Ws. 1 and 2 and allow the accused to cross-examine them, on the ground that the witnesses did not give proper answer as to why the polythene bag was reversed and tied with the material objects; that the prosecution has not clarified the same; that the weight of the material objects are in dispute and the taking of samples are very much questioned, and hence the petitioner must have been afforded opportunity to defend the case; that when P.W.1 was examined, the petitioner sought for deferring the crossexamination till the other witness was examined. However, the learned Special Judge has recorded

as if the petitioner has not cross-examined the witness, in spite of giving an opportunity; that when P.W.2 was examined, the material document/information received and recorded was not filed and therefore, the petitioner's counsel restricted the question for the document which was not produced before the court and therefore, the learned Special Judge ought to have allowed the application for recalling and examining P.W.2; that at a later point of time, a copy of the document was marked and therefore, the petitioner was denied the opportunity to put question relating to the document filed and thus, he was not given full opportunity to cross-examine P.W.2, who is alleged to have received information. On such grounds, the petitioner would pray to allow both the Criminal Original Petitions thereby setting aside the orders of the learned Special Judge, E.C. Court, Coimbatore.

3. In the counter filed by the respondent, it would be pleaded that on 23.10.2002 at 10.30 a.m. the residence of the petitioner/accused, in the presence of his wife, was searched, wherein, the officer found ganja loosely spread without any packing on the bedroom and ganja was also found in the room packed into polythene bags weighing 12 kgs. and 10 kgs. respectively and drawing samples from there, and thereafter stitching the mouth of the bags, affixed the signature and the seal of the Superintendent of Customs, also obtaining the signature of the petitioner/accused and two other witnesses on the tag annexed to the sealed bags; that similarly, the sample packets were also placed in sealed covers; that the ganja and samples drawn there in the presence of the petitioner, his wife and two independent witnesses, were seized under a mahazar for further action under NDPS Act; that on 23.10.2002, they have also recorded the voluntary statement of the accused in the presence of the Superintendent of Customs, Preventive Unit, Salem; that they arrested the accused on the very same day and produced him before the learned Magistrate, Gobi, who remanded him to judicial custody; that the respective samples(original) were sent to the Chemical Examiner, Customs Laboratory, Chennai under a Test memo. on the very same day; that the Chemical Examiner, Chennai, sent a report dated 8.11.2002, wherein he opined that the samples are "Cannabis" (Ganja); that after completing the investigation, a complaint in C.C.No.43 of 2003 was filed before the Special Court of NDPS cases, Coimbatore on 25.2.2003; that the prosecution commenced the trial by examining Shri R.S.Narasimhamoorthy, Chemical Examiner as P.W.1; that thereafter, the prosecution examined the Superintendent of Customs as P. W.2 and one independent witness as P.W.3 in order to prove the recovery of ganja from the residence of the petitioner/accused; that the seized Ganja were marked as Mos.3 and 4 through P.Ws.2 and 3; that the petitioner/accused did not raise any objection to the marking of the material objects at that time and nowhere, he has disputed that M.Os. 3 and 4 are not ganja, but on the contrary he has taken a specific plea that the recovery of Ganja (Mos. 3 and 4) was not from his residence, but it has been foisted on him by P.W.2; that on such grounds, the petitioner/accused has filed both the above Crl.M.Ps. at the time when the prosecution evidence had come to a close; that when the petitioner/accused was produced along with the seized ganja before the remanding Magistrate on 23.l0.2002, he did not choose to allege that the property was not ganja; that after a lapse of more than 7 months, the petitioner/accused has come up with a specific plea that M.Os. 3 and 4 should be cut open for the purpose of verification by P.W.1 and

to recall P.Ws.1 and 2 for further cross-examination; that the learned Special Judge has rightly dismissed the said Crl.M.Ps. setting out the reasons. On such averments, the respondent would pray to dismiss both the above Criminal Original Petitions.

4. During arguments, learned counsel appearing on behalf of the petitioner and the learned Special Public Prosecutor as well would only reiterate what has been brought forth in the above petitions and the counter, besides on the part of the learned counsel for the petitioner and the respondent each citing a judgment in support of their respective cases. The petitioner would cite from the judgment delivered in Rajendra Prasad v. Narcotic Cell reported in (1999) 6 SCC 110, wherein it is held:

"A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.
Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

Likewise the respondent would cite a judgment delivered in Jagadeeswari Oil Tracing Co. v. Asst. Comml. Tax Officer reported in (1983) Vol.52 Sales Tax Cases 125 wherein it is by the Hon'ble Apex Court:

"Unless the statute in express words or by necessary implication laid down that one remedy was to the exclusion of the other, the observations of Mahamood, J., quoted above must apply."
"However, in the absence of any such provision in the TravancoreCochin General Sales Tax Act (11 of 1125), the Supreme Court opined that both the remedies are open to the authorities and they could resort to any one of them at their option."

5. From the above backdrop, if a decision has to be arrived at in both the above petitions, it has become relevant to go into the orders passed by the trial court, wherein the learned Judge would write that in the event that there has been no denying of the fact that what is contained in M.Os.3 and 4 is 'ganja', there is absolutely no necessity to cut open the polythene bag (as it has been prayed for in Crl. M.P.No.611 of 2003, as though the defence was suspicious about the contraband contained in these

M.O.Nos.3 and 4, which is only an afterthought) and further so far as the subject matter connected to the other Crl.M.P.No.610 of 2003 is concerned, the lower court would make it clear beyond doubt that sufficient and reasonable opportunities have been afforded for the defence to cross-examine P.W.2 regarding Exs.P.1 4 and P.15 marked therein, and if at all the defence has not made best use of the same, the Court is not to be blamed, and therefore, since this Court is convinced of the opportunities that have already been given is sufficient and reasonable in the petitions filed before the lower court, no greater advantage also seems to be in favour of the petitioner, and therefore, without wasting much of time, it is only desirable to permit the lower court to carry on with the rest of the trial procedure, particularly in view of the fact that the petitioner, by the denial of the reliefs sought for in connecting both the above two petitions, has not at all become prejudiced in law.

In result,

(i) Both the above criminal original petitions are without merit and they are dismissed as such; and

(ii) consequently, Crl.M.P.No.5870 of 2003 is also dismissed.
gr/gs.

To

The Superintendent of Customs,
Customs Preventive Unit,
Salem.

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